

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

COYNESS L. ENNIX JR., M.D., as an  
individual and in his representative capacity  
under Business & Professions Code  
Section 17200, et seq.,

Plaintiff,

v.

RUSSELL D. STANTEN, M.D., LEIGH I.G.  
IVERSON, M.D., STEVEN A. STANTEN,  
M.D., WILLIAM M. ISENBERG, M.D.,  
Ph.D., ALTA BATES SUMMIT MEDICAL  
CENTER, and DOES 1 through 100,

Defendants.

No. C 07-02486 WHA

**ORDER GRANTING IN PART  
AND DENYING IN PART  
MOTION TO DISMISS**

**INTRODUCTION**

In this case arising out of a medical peer review, defendants move to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and move to strike the complaint under California's anti-SLAPP (Strategic Lawsuit Against Public Participation) statute. For the below-stated reasons, defendants' motion to dismiss is **DENIED IN PART** and **GRANTED IN PART**.

**STATEMENT**

The following allegations are taken from the complaint and are taken as true for purposes of the instant motion to dismiss. Plaintiff, Dr. Coyness Ennix, Jr., is an African

1 American cardiac surgeon with surgical privileges at six Bay Area hospitals, including at  
2 defendant Alta Bates Summit Medical Center. During the relevant time period, plaintiff had  
3 surgical privileges at Alta Bates Summit, Summit Campus, and Doctors Hospital in San Pablo.  
4 Defendants are Alta Bates Summit and certain individual physicians who were alleged  
5 participants in a peer review of plaintiff's performance as a cardiothoracic surgeon at Alta Bates  
6 Summit (Compl. ¶ 5).

7 In 2003, plaintiff was allegedly the busiest surgeon performing cardiac procedures  
8 among the private doctors practicing at Alta Bates Summit. During that year, plaintiff began  
9 promoting the idea of developing a minimally invasive cardiac-surgery and robotic-surgery  
10 program at Alta Bates Summit. Minimally invasive cardiac surgery was a relatively new  
11 technique allowing surgeons to perform cardiac surgery by way of a small incision on the side  
12 of the rib cage, instead of by opening the chest at the sternum (Compl. ¶ 19).

13 In January and February of 2004, plaintiff performed four minimally invasive  
14 cardiac-surgery procedures at Alta Bates Summit. In these cases, plaintiff and the surgical staff  
15 encountered issues such as prolonged procedure time, increased blood usage, and conversion to  
16 the more traditional approach. These four cases came to the attention of defendant Dr. Steven  
17 Stanten, Chair of the Department of Surgery and Chair of the Surgical Peer Review Committee  
18 at Alta Bates Summit. Dr. Stanten called for a moratorium on all minimally invasive  
19 cardiac-surgery procedures, pending further evaluation. Plaintiff suspended use of this  
20 technique in compliance with the moratorium (Compl. ¶ 20).

21 Dr. Stanten asked Dr. Hon Lee, a cardiac surgeon, to review the four minimally invasive  
22 surgeries with respect to the standard of care. Although Dr. Lee noted some documentation  
23 issues, he concluded that there were no patient-care concerns regarding any of the four cases  
24 (Compl. ¶ 20).

25 Despite the fact that Dr. Lee allegedly cleared the four minimally invasive cases, Dr.  
26 Stanten brought the cases before the Surgical Peer Review Committee. Plaintiff was not  
27 afforded an opportunity to address the peer review committee. Dr. Stanten stated that the cases  
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1 might present patient-care issues. The review committee declined to accept Dr. Lee's findings  
2 that issues with the cases were of documentation, not care (Compl. ¶ 21). Apparently, however,  
3 no discipline resulted from the committee's action.

4 Some months later, an ad hoc committee was formed by management to conduct a  
5 second round of peer review on the same four minimally invasive cases, as well as six more of  
6 plaintiff's cases. On January 4, 2005, the ad hoc committee requested that a private, outside  
7 peer-review organization called National Medical Audit review all ten of plaintiff's cases.  
8 Plaintiff objected to the referral to the National Medical Audit, alleging that it was a sham. On  
9 May 3, 2005, National Medical Audit returned an unsigned report harshly criticizing plaintiff's  
10 performance on all ten of the reviewed cases (Compl. ¶ 24).

11 On May 4, 2005, plaintiff performed an operation in which he replaced two valves in a  
12 young male patient. The next day, plaintiff made rounds on the patient twice, once in the  
13 morning and once in the afternoon. Plaintiff did not note the rounds himself that day but his  
14 rounds were documented in the nurses' notes. On May 6, plaintiff made rounds on the patient  
15 again and noted those rounds. He also noted his previous rounds on that patient which he had  
16 not recorded the day before (Compl. ¶ 25).

17 On May 11, 2005, defendant Dr. William Isenberg, President of the Medical Staff,  
18 summarily suspended plaintiff alleging that he had placed the patient in danger by not making  
19 rounds on the patient on May 5. Dr. Isenberg accused plaintiff of failing to see the double-valve  
20 patient and of falsifying the record claiming that he had seen the patient. Plaintiff produced a  
21 letter from the on-duty nurse as well as nurses' notes verifying that he had seen the patient more  
22 than once on May 5. Despite this, the Medical Executive Committee upheld the suspension on  
23 May 18, 2005, pending the outcome of the ad hoc committee process (Compl. ¶ 26).

24 Faced with a loss of his ability to practice at the Alta Bates Summit hospital, plaintiff  
25 asked Dr. Isenberg to at least allow him to continue working in the reduced capacity as a  
26 surgical assistant. The Medical Executive Committee accepted plaintiff's proposal to allow him  
27 to retain privileges as a surgical assistant. Defendants, however, insisted that no plaintiff had no  
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1 hearing rights because plaintiff “expressly stipulated” to surgical assisting in lieu of suspension  
2 (Compl. ¶ 27).

3 The ad hoc committee then delivered a review of plaintiff that recommended reinstating  
4 plaintiff’s surgical privileges subject to the requirement that he have a proctor present. On  
5 September 7, 2005, the Medical Executive Committee upheld the ad hoc committee’s report and  
6 recommendation (Compl. ¶ 29).

7 Approximately 45 days later, Alta Bates Summit gave plaintiff two choices: either  
8 appeal the decision and remain suspended indefinitely or accept a condition that he have a  
9 proctor present at all of surgeries at the hospital. Plaintiff chose the latter course. On October  
10 25, 2005, plaintiff secured six staff cardiac surgeons to serve as proctors (Compl. ¶ 30).

11 On December 30, 2005, Dr. Isenberg again summarily suspended plaintiff’s privileges  
12 without justification, it is alleged. Dr. Isenberg imposed the summary suspension without  
13 consulting the proctors who had been observing plaintiff’s surgeries. After consulting officers  
14 of the Medical Executive Committee, however, Dr. Isenberg reinstated plaintiff’s  
15 proctor-restricted privileges on January 6, 2006 (Compl. ¶ 31).

16 On April 19, 2006, the proctors reported on the 29 surgical cases they had proctored,  
17 stating that they unanimously agreed that plaintiff met or exceeded expectations in pre- and  
18 post-operative phases, and met the standard of care in the peri-operative phases. The proctors  
19 also unanimously recommended that “the proctorship be terminated and that Dr. Ennix be  
20 reinstated to the medical staff with full unrestricted privileges” (Compl. ¶ 32).

21 The Medical Executive Committee initially voted to continue the proctorship  
22 requirement. Eventually, however, on July 11, 2006, the Committee finally voted to remove the  
23 proctorship requirement (Compl. ¶ 33).

24 Plaintiff’s instant complaint states six claims against defendants: (1) racial  
25 discrimination in violation of 42 U.S.C. 1981; (2) violation of California’s Unruh Act; (3)  
26 violation of California’s Cartwright Act; (4) tortious interference with plaintiff’s right to  
27 practice his profession; and (5) violation of California Business and Professions Code 17200.  
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1 Defendants now move to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6).  
2 They also move to strike the state claims pursuant to California's anti-SLAPP statute. Because  
3 this order rules in defendants' favor on the motion to dismiss the state claims, there is no need  
4 to address the motion to strike under California's anti-SLAPP statute.

### 5 ANALYSIS

6 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims alleged  
7 in the complaint. The Supreme Court has recently explained that "[w]hile a complaint attacked  
8 by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's  
9 obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and  
10 conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell*  
11 *Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964–65 (May 21, 2007) (citations and alterations  
12 omitted). "[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat  
13 a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136,  
14 1140 (9th Cir. 1996). In complaints that do not allege fraud, plaintiffs need only make "a short  
15 and plain statement of the claim," thus giving the defendant fair notice of the claim and of the  
16 grounds upon which it rests. *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (quoting Fed. R. Civ. P.  
17 8(a)(2)).

18 Although materials outside of the pleadings should not be considered, a court may  
19 consider all materials properly submitted as part of the complaint, such as exhibits. *Hal Roach*  
20 *Studios*, 896 F.2d at 1555 n.19. Otherwise, under Rule 12(c), if "matters outside the pleadings  
21 are presented to and not excluded by the court," the motion must be treated as a summary  
22 judgment motion instead. Under Rule 56, summary judgment is proper where the evidence  
23 shows that "there is no genuine issue as to any material fact and that the moving party is entitled  
24 to judgment as a matter of law."

1           **1. FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES OR PURSUE MANDAMUS**  
 2           **RELIEF.**

3           Defendants' arguments regarding the exhaustion of administrative remedies and  
 4 plaintiff's failure to seek a writ of mandamus will be construed as a motion for summary  
 5 judgment. This order holds that, as to the state claims for relief, plaintiff has neither exhausted  
 6 his administrative remedies nor successfully pursued mandamus relief before initiating the  
 7 instant action. Moreover, the administrative procedures were available to plaintiff and were not  
 8 unfairly applied to him. All the state claims must be dismissed for failure to exhaust.<sup>1</sup>

9           **A. The Westlake Requirements.**

10           In *Westlake Community Hospital v. Superior Court of Los Angeles County*, 17 Cal. 3d  
 11 465, 469, 483–84 (1976), the California Supreme Court established the rule that a doctor whose  
 12 staff privileges are modified as a result of hospital peer review may not sue the hospital or the  
 13 individuals involved in the decision without first taking all available steps to have the  
 14 peer-review decisions overturned:

15           [B]efore a doctor may initiate litigation challenging the propriety  
 16 of a hospital's denial or withdrawal of privileges, he must exhaust  
 17 the available internal remedies afforded by the hospital. As we  
 18 explain, this exhaustion of remedies principle has long been  
 applied in suits attacking the actions of comparable "private  
 associations," and we conclude that the doctrine applies when a  
 doctor sues in tort for monetary damages as well as when he seeks  
 a judicial order compelling reinstatement or admission.

19           We further conclude that whenever a hospital, pursuant to a  
 20 quasi-judicial proceeding, reaches a decision to deny staff  
 21 privileges, an aggrieved doctor must first succeed in setting aside  
 22 the quasi-judicial decision in a mandamus action before he may  
 23 institute a tort action for damages. As we point out, mandate has  
 24 been the traditional means for reviewing analogous quasi-judicial  
 determinations, and we believe that before hospital board or  
 committee members are subjected to potential personal liability  
 for actions taken in a quasi-judicial setting, an aggrieved doctor  
 should be required to overturn the challenged quasi-judicial  
 decision directly in a mandamus action.

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26           <sup>1</sup> The exhaustion discussion does not apply to plaintiff's federal Section 1981 claim. *Johnson v.*  
 27 *Greater Se. Cmty. Hosp. Corp.*, 951 F.2d 1268, 1276 (D.C. Cir. 1991) ("A private party alleging federal civil  
 28 rights violations need not pursue internal administrative remedies before pressing a claim in federal court.").

1 The Ninth Circuit has explained that *Westlake* “applies to all cases where a  
2 quasi-judicial decision is the basis of a cause of action,” and that the principle announced in that  
3 decision “is not limited to cases that sound in tort.” *Mir v. Little Co. of Mary Hosp.*, 844 F.2d  
4 646, 651 (9th Cir. 1988). In *Mir*, the plaintiff doctor sued a hospital which had partially denied  
5 his applications for staff privileges. The district court in which the plaintiff sued dismissed the  
6 plaintiff’s complaint for failure to state a claim. The Ninth Circuit agreed that all of the  
7 plaintiff’s state claims for relief were barred by his failure to obtain a writ of mandate before  
8 filing his complaint for damages. *Id.* at 650–51.

9 Plaintiff alleges that the failure to exhaust administrative remedies is an affirmative  
10 defense that plaintiff need not negate in the complaint. *See Payne v. Anaheim Memorial Med.*  
11 *Ctr.*, 130 Cal. App. 4th 729, 742 n.8 (2005). While *Mir* affirmed an order granting a Rule  
12 12(b)(6) motion to dismiss, *Mir* did not expressly decide whether a plaintiff needs to  
13 specifically plead this requirement in federal court. *Mir*, 844 F.2d at 647. This order need not  
14 resolve whether plaintiff must plead in the complaint that he exhausted administrative remedies  
15 and succeeded in setting aside the quasi-judicial decision in a mandamus action. In support of  
16 and in opposition to the instant motions, the parties submitted voluminous documents regarding  
17 the administrative relief and attempt (or lack thereof) by plaintiff to petition for mandamus.  
18 This order will consider those documents and construe the motion, for this issue, as one for  
19 summary judgment. *See Cunningham v. Rothery (In re Rothery)*, 143 F.3d 546, 549 (9th Cir.  
20 1998) (explaining that a federal court may treat a Rule 12(b)(6) motion as one for summary  
21 judgment under Rule 56 to the extent extra-complaint material is entertained).

22 **B. Whether Plaintiff is Excused from *Westlake*.**

23 *Westlake* and *Mir* clearly require that plaintiff have “exhaust[ed] the available internal  
24 remedies afforded by the hospital” and have “succeed[ed] in setting aside the quasi-judicial  
25 decision in a mandamus action” before initiating litigation. *Westlake Cmty. Hosp.*, 17 Cal. 3d at  
26 469. It is undisputed that plaintiff never had a hearing on the disciplinary action, nor did he  
27 ever seek to force a hearing through a mandamus action. It is also conceded by plaintiff that the  
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1 procedures used were “peer review.” Plaintiff instead alleges that he should benefit from the  
2 rule that the *Westlake* requirements have “no application in a situation where an administrative  
3 remedy is unavailable or inadequate.” *Payne*, 130 Cal. App. 4th at 743 (quotations omitted).

4 Plaintiff’s instant claims arise from two restrictions imposed on his surgical privileges.  
5 *First*, in May 2005, defendants allegedly asked plaintiff to choose between: (1) accepting total  
6 suspension of his privileges, which would have triggered internal administrative appeal rights;  
7 and (2) accepting a lesser restriction (surgical assisting), which defendants claimed would not  
8 give him any rights to internal appeals under the bylaws (Isenberg Decl. Exh. J). Plaintiff  
9 allegedly chose to accept the surgical-assisting restriction to avoid financial devastation.<sup>2</sup>  
10 Importantly, although plaintiff accepted the restriction, counsel for plaintiff steadfastly  
11 maintained that any “waiver” of plaintiff’s hearing rights was impermissible under the bylaws  
12 (Etchevers Decl. Exhs. A, B).

13 *Second*, in October 2005, defendants again allegedly asked plaintiff to choose between  
14 alternate disciplinary routes: (1) accept a total suspension of his surgical privileges, which  
15 would have given rise to internal appeal rights, or (2) accept the requirement that he be  
16 “proctored,” which defendants told plaintiff could not be appealed internally (Isenberg Decl.  
17 Exh. K). Plaintiff accepted the proctoring restriction. At oral argument, plaintiff’s counsel  
18 agreed that plaintiff never signed an express waiver of his hearing rights.<sup>3</sup>

19 It seems undisputed that had the Committee determined *unilaterally* to place plaintiff  
20 under the surgical-assisting restriction or the proctoring restriction, he would have had the right  
21 to a hearing. Under the terms of the February 2003 bylaws, which were in effect when  
22 plaintiff’s privileges were suspended in May 2005, he was clearly entitled to challenge the  
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24 <sup>2</sup> Given that plaintiff had privileges at other hospitals, the Court is skeptical that plaintiff was “forced”  
25 to accept a reduction in privileges because of economic coercion. This order need not decide whether plaintiff  
26 was coerced because the findings above are dispositive.

27 <sup>3</sup> A third restriction, that plaintiff was suspended from performing minimally invasive valve  
28 procedures, is alleged in the complaint but abandoned in plaintiff’s briefing (Compl. ¶ 22; Opp. to Mtn. to Strike  
at 14–15).



1 Committee's action by requesting a hearing due to the "[r]eduction in clinical privileges"  
2 (Isenberg Decl. Exh. A at 41). Similarly, the June 2005 bylaws, which were in effect when the  
3 Committee reinstated plaintiff's privileges as a primary surgeon subject to a proctoring  
4 restriction, allowed a physician to request a hearing for "[s]ignificant restriction of clinical  
5 privileges (except for proctoring incidental to Provisional Status, new privileges, insufficient  
6 activity, or return from leave of absence) for more than fourteen (14) days based on professional  
7 competence or conduct which affects or could adversely affect the health or welfare of a patient  
8 or patients" (Isenberg Decl. Exh. B at 47).

9 The problem here is that the Committee did not unilaterally decide to restrict plaintiff's  
10 privileges. Plaintiff here expressly agreed to the privilege restrictions, in lieu of a total  
11 suspension of his surgical privileges. The issue before the Court is whether these circumstances  
12 excuse the exhaustion and mandamus requirements. This order holds that under the facts of this  
13 case, plaintiff should not be excused from the requirements of *Westlake*. Whether plaintiff ever  
14 validly waived his right to a hearing is not an issue this order needs to decide, although given  
15 that he had full privileges at several other hospitals, it is hard to see how loss of one set of  
16 privileges would have been as devastating as plaintiff alleges in a conclusory fashion. More to  
17 the point, if he did validly waive his entitlement to a hearing, he cannot now, under *Westlake*,  
18 seek to litigate claims by alleging the unavailability or unfairness of such an administrative  
19 remedy. On the other hand, if the "waiver" of his rights was actually invalid — as plaintiff's  
20 counsel maintained during the review process — then he should have requested a hearing even  
21 after he agreed to the restrictions on his privilege (Etchevers Decl. Exhs. A, B).

22 To the extent that plaintiff argues that he did request a hearing and the request was  
23 denied, his remedy was a writ of mandate under California Code of Civil Procedure Section  
24 1085, which "anticipates the arbitrary or improper refusal by an association to hold a hearing  
25 and authorizes resort to a writ of mandate to compel such a hearing." *Payne*, 130 Cal. App. 4th  
26 at 745. Plaintiff could have applied for a writ if he felt that his hearing rights were being  
27 wrongfully denied.  
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1 Defendant relies on two inapposite decisions to suggest that the administrative remedy  
2 was unavailable. In *Payne*, a colleague of the plaintiff at the hospital had made a remark which  
3 the plaintiff considered to be a racial slur. The medical center's internal procedures there did  
4 not address that type of disagreement. The state court of appeal excused the exhaustion  
5 requirement:

6 Anaheim Memorial's medical staff bylaws entitle its medical staff  
7 to make certain decisions in accordance with internal procedures.  
8 However, only certain of those decisions are subject to being  
9 challenged internally through a quasi-judicial process. What  
happened to Payne was not one of those decisions. Because his  
privileges were not formally impacted, he had no right to any  
administrative hearing process to air his grievances.

10 *Payne*, 130 Cal. App. 4th at 739.

11 The instant case differs from *Payne* because, as discussed above, the bylaws did allow  
12 plaintiff to challenge both the May 2005 and October 2005 decisions. In *Payne*, administrative  
13 remedies were truly unavailable for the type of alleged harm suffered by the plaintiff. Here,  
14 however, plaintiff had — and indeed was aware of — his right to appeal the specific  
15 deprivations he actually suffered. *Payne* is distinguishable.

16 Plaintiff also relies on *Joel v. Valley Surgical Center*, 68 Cal. App. 4th 360, 371 (1998),  
17 for the proposition that even if he “forfeited” his rights to administrative appeals, that does not  
18 establish that he forfeited his rights to pursue damages claims arising from those suspensions.  
19 In *Joel*, the hospital summarily suspended Dr. Joel's privileges. He was offered a hearing and  
20 requested one, but prior to the hearing the parties entered into a written settlement whereby Dr.  
21 Joel's privileges were fully reinstated. The agreement included a statement that the settlement  
22 “has no legal effect on any other matter or any damages claim resulting from the summary  
23 suspension.” Additionally, it stated that “nothing in this settlement or agreement releases either  
24 party from any claim or action which might otherwise exist or relieves any party from any legal  
25 obligation to satisfy or complete any action or proceeding as a precedent to asserting any  
26 claim.” *Id.* at 68 Cal. App. 4th at 363–64.

1 Following his reinstatement, Dr. Joel sued for damages. The hospital contended that his  
2 claim was barred by *Westlake* because he failed to exhaust his administrative remedies. The  
3 court of appeal disagreed. The key to the holding was that the settlement agreement provided  
4 for the *full reinstatement* of Dr. Joel's privileges. The *Westlake* requirement could be excused  
5 where "the administrative machinery has been commenced, but the parties resolve the dispute  
6 before its completion through settlement which awards the physician the *maximum* benefit he or  
7 she could have been afforded administratively." *Id.* at 366–67 (emphasis added).

8 The results of the agreements with plaintiff in this case were incomplete. In May 2005  
9 and October 2005, the parties resolved their disputes by compromise — an agreement that  
10 plaintiff be limited to surgical-assisting privileges and then to imposed proctorship. Plaintiff  
11 does not dispute that full reinstatement could have been sought had he exercised his hearing  
12 rights. If he thought he was entitled to a hearing despite the mutual acceptance of an alternative  
13 action against his privileges, he "could have sought a writ of mandate from the superior court to  
14 compel the Hospital to begin the hearing." *Kaiser Found. Hosp. v. Superior Court*, 128 Cal.  
15 App. 4th 85, 105–06 (2005). *Joel* is inapplicable here.

16 Plaintiff also contends that the process afforded to him was unfair and inadequate.  
17 Specifically, plaintiff contends in a conclusory fashion that the process would have resulted in  
18 financial hardship to him. This argument lacks merit. The California Court of Appeal has  
19 rejected a similar argument, stating that "[a] remedy will not be deemed inadequate merely  
20 because additional time and effort would be consumed by its being pursued through the  
21 ordinary course of the law, and such time and effort will inevitably involve some cost." *Eight*  
22 *Unnamed Physicians v. Med. Executive Committee*, 150 Cal. App. 4th 503, 512 (2007)  
23 (quotations omitted). Moreover, "litigation expenses, however substantial and nonrecoverable,  
24 which are normal incidents of participation in the agency process do not constitute irreparable  
25 injury." *Ibid.* Strong policy considerations underlie this holding. Specifically, California  
26 courts recognize that "it must be remembered that license suspension, revocation or other  
27 similar disciplinary proceedings involving licensees are not for the purpose of punishment but  
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1 primarily to protect the public served by the licensee employed by a hospital.” *Bollengier v.*  
2 *Doctors Med. Ctr.*, 222 Cal. App. 3d 1115, 1128 (1990). Plaintiff has not demonstrated that the  
3 process was unfair.

4 For the above-stated reasons, defendants’ motion to dismiss, construed as a motion for  
5 summary judgment, is granted as to all of plaintiff’s state claims on account of his failure to  
6 comply with the *Westlake* requirements.

## 7 2. SECTION 1981 CLAIM.

8 Defendants also move to dismiss plaintiff’s federal claim, which is based on an alleged  
9 violation of 42 U.S.C. 1981. In order to establish a claim under Section 1981, “a plaintiff must  
10 establish that (1) he or she is a member of a racial minority; (2) the defendant intended to  
11 discriminate against plaintiff on the basis of race; and (3) the discrimination concerned one or  
12 more of the activities enumerated in the statute (i.e., the right to make and enforce contracts, sue  
13 and be sued, give evidence, etc.).” *Jones v. Tozzi*, No. 05-CV-0148 OWW DLB, 2006 WL  
14 1582311, at \*7 (E.D. Cal. June 2, 2006) (Wanger, J.). Defendants here contend that the  
15 complaint fails to allege the existence of a contractual relationship between plaintiff and the  
16 medical center sufficient to state a claim for relief under Section 1981.

17 In *Domino’s Pizza, Inc. v. McDonald*, 126 S. Ct. 1246, 1249 (2006), the Supreme Court  
18 held that “[a]ny claim brought under § 1981 . . . must initially identify an impaired ‘contractual  
19 relationship,’ under which the plaintiff has rights.” Here the complaint does allege that the  
20 actions taken by defendants “concerned Dr. Ennix’s abilities to perform his contractual duties  
21 with Alta Bates Summit and his patients and Dr. Ennix’s abilities to enjoy the benefits,  
22 privileges, terms and conditions of those contractual relationships” (Compl. ¶ 41). These  
23 allegations satisfy the liberal pleading standards of Rule 8. *See Maduka v. Sunrise Hosp.*, 375  
24 F.3d 909, 912–13 (9th Cir. 2004). Plaintiff has alleged that his contractual relationship with the  
25 hospital was impaired on account of Alta Bates Summit’s intentional discrimination based on  
26 his race. This allegation is sufficient to “identify injuries flowing from a racially motivated  
27 breach of [his] own contractual relationship.” *Domino’s Pizza, Inc.*, 126 S. Ct. at 1252.  
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1 Defendants also contend that the allegation in the complaint that a contract existed is  
2 false because plaintiff in fact never had a contract with the medical center. For this proposition,  
3 defendants rely on *O'Byrne v. Santa Monica-UCLA Med. Ctr.*, 94 Cal. App. 4th 797, 810  
4 (2001), which held: "[U]nder California contract law, medical staff bylaws adopted pursuant to  
5 California Code of Regulations, title 22, section 70703, subdivision (b), do not in and of  
6 themselves constitute a contract between a hospital and a physician on its medical staff.  
7 Whether they become incorporated into a separate employment contract between the hospital  
8 and the physician is another question."

9 The issue raised by defendants' citation to *O'Byrne* is whether the hospital's bylaws  
10 either themselves created a separate contract or were incorporated into some other existing  
11 employment contract. Compare *O'Byrne*, 94 Cal. App. 4th at 810, with *Janda v. Madera*  
12 *Comm. Hosp.*, 16 F. Supp. 2d 1181, 1187 (E.D. Cal. 1998) (Wanger, J.). This question,  
13 however, need not be resolved at the pleading stage, where it is sufficient that plaintiff has made  
14 a "plausible" claim that he had a contractual relationship with the hospital. *Twombly*, 127 S.Ct.  
15 at 1974 (holding that plaintiff must plead "enough facts to state a claim to relief that is plausible  
16 on its face"). Moreover, the *O'Byrne* court also did *not* dispute that there was "an *underlying*  
17 contractual employment relationship between the physician and the hospital supported by valid  
18 consideration: the hospital's promise to employ the physician under the stated terms and  
19 conditions, and his promise to work under those conditions." *Id.* at 807 (emphasis added)  
20 (citing *Janda*, 16 F. Supp. 2d at 1186). Construing the allegations in the complaint as true, that  
21 contractual relationship existed on its own regardless of the bylaws.

### 22 3. DOE DEFENDANTS.

23 Defendants also move to dismiss the Doe defendants. The Ninth Circuit has explained  
24 that "[a]s a general rule, the use of 'John Doe' to identify a defendant is not favored." *Gillespie*  
25 *v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). The court of appeals has also recognized,  
26 however, that "situations arise . . . where the identity of alleged defendants will not be known  
27 prior to the filing of a complaint." *Ibid.* Accordingly, "[i]n such circumstances, the plaintiff  
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1 should be given an opportunity through discovery to identify the unknown defendants, unless it  
2 is clear that discovery would not uncover the identities, or that the complaint would be  
3 dismissed on other grounds.” *Ibid*.

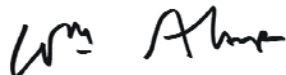
4 Plaintiff asserts that he is unaware of defendants, other than those identified, who may  
5 have participated with the named defendants to participate in the alleged scheme to interfere  
6 with plaintiff’s practice. It is plausible that other individuals may have played a role in the  
7 peer-review process. Under *Gillespie*, plaintiff will be allowed an opportunity to conduct  
8 discovery to identify those defendants and will be given a deadline to name and serve them.

### 9 CONCLUSION

10 For the foregoing reasons, defendants’ motion to dismiss the complaint is **GRANTED IN**  
11 **PART** and **DENIED IN PART**. The only remaining claim in this case is the Section 1981 claim.  
12 Defendants’ motion to strike pursuant to California’s anti-SLAPP statute was only directed at  
13 the state claims, which have been dismissed on other grounds. Accordingly, the anti-SLAPP  
14 motion is **MOOT**. The evidentiary objections filed by both parties are similarly moot.

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16 **IT IS SO ORDERED.**

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18 Dated: August 28, 2007.

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21 WILLIAM ALSUP  
22 UNITED STATES DISTRICT JUDGE  
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